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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/664,616	09/19/2003	Richard S. Goldhor	mediacip-con	4024
27087	7590	10/06/2009	EXAMINER	
MICHAEL B. EINSCHLAG, ESQ. 25680 FERNHILL DRIVE LOS ALTOS HILLS, CA 94024			CLOUD, JOIYA M	
ART UNIT	PAPER NUMBER			
	2444			
MAIL DATE	DELIVERY MODE			
10/06/2009	PAPER			

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

<b>Office Action Summary</b>	<b>Application No.</b> 10/664,616	<b>Applicant(s)</b> GOLDHOR ET AL.
	<b>Examiner</b> Joiya M. Cloud	<b>Art Unit</b> 2444

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --  
**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
  - If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
  - Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED. (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

#### Status

- 1) Responsive to communication(s) filed on 10 June 2009.
- 2a) This action is FINAL.      2b) This action is non-final.
- 3) Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

#### Disposition of Claims

- 4) Claim(s) 10-14 and 18 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) Claim(s) \_\_\_\_\_ is/are allowed.
- 6) Claim(s) 10-14 and 18 is/are rejected.
- 7) Claim(s) \_\_\_\_\_ is/are objected to.
- 8) Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

#### Application Papers

- 9) The specification is objected to by the Examiner.
- 10) The drawing(s) filed on \_\_\_\_\_ is/are: a) accepted or b) objected to by the Examiner.  
 Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
 Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

#### Priority under 35 U.S.C. § 119

- 12) Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) All    b) Some \* c) None of:  
 1. Certified copies of the priority documents have been received.  
 2. Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.  
 3. Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

#### Attachment(s)

- 1) Notice of References Cited (PTO-892)  
 2) Notice of Draftsperson's Patent Drawing Review (PTO-948)  
 3) Information Disclosure Statement(s) (PTO-1668)  
 Paper No(s)/Mail Date 10/24/2007
- 4) Interview Summary (PTO-413)  
 Paper No(s)/Mail Date \_\_\_\_\_
- 5) Notice of Informal Patent Application  
 6) Other: \_\_\_\_\_

***DETAILED ACTION***

This action is responsive to the communication filed 06/10/2009. Claims 10-14 and 18 are PENDING.

***Response to Arguments***

A) "...Gupta teaches no action is to be taken to prevent or even mitigate the effects of emptying a data buffer...Hence Gupta does not even address the problem solved by the invention of claims 10-14 and 18...Gupta only deals with a problem of limited bandwidth." "In sum, Gupta does not teach or suggest, in any manner, how to deal with issues of CPU availability."

As to the above argument A), Examiner respectfully disagrees.

In response to applicant's argument that Gupta is nonanalogous art, it has been held that a prior art reference must either be in the field of applicant's endeavor or, if not, then be reasonably pertinent to the particular problem with which the applicant was concerned, in order to be relied upon as a basis for rejection of the claimed invention. See *In re Oetiker*, 977 F.2d 1443, 24 USPQ2d 1443 (Fed. Cir. 1992). In this case, the present invention pertains to the field of playback of media such as audio and audio-visual works which are retrieved from sources having non-deterministic delays. Examiner submits that as the prior art of records pertains to the efficient use of limited bandwidth thereby maximizing the practical applications of variable playback of multimedia streaming content such as audio and video, the prior art clearly relates to achieving synchronized playback of media content. Embodiments of the current invention disclose frame rate adjustments causing frames to be "skipped, discarded or merged." (paragraph 0020) Likewise, Gupta teaches bandwidth reduction by way of dropping

"lower-level dependent frames from the video stream." (). Thus, both the invention and the prior art of record relate to the same field- that of time-scale modification of media content streamed over a network, to achieve content integrity.

B) Hoyer does not teach or suggest using CPU utilization for any purpose whatsoever than to display it. Regarding claim 10, Applicant's submit that "there is no suggestion or motivation to combine the teachings of Gupta and Hoyer in any way whatsoever."

As to the above argument B), Examiner respectfully disagrees. First, Examiner submits that the instant merely recites, "determining *a measure* of CPU availability. No where does the claim recite that the actual CPU availability is determined or furthermore, *how* such determination is made. Additionally, the claim provides no requisite degree as to what constitutes "*a measure*". Therefore, Examiner submits that given the terms "cpu availability" and "cpu utilization" are well known in the art, a person of ordinary skill in the art would be reasonably apprised to interpret *a measure of CPU availability* to include CPU utilization, the effective inverse of CPU availability. Moreover, high availability implies low utilization and vice versa, thus one is a measure of the other. Examiner suggest Applicant amend the claim language to clearly recite the intended invention

Examiner also makes note of further disclosure of Hoyer that explicitly recite "determining a measure of CPU availability" as recited in claim 10, where a cluster controller of a performance monitor "determines the availability of servers by polling servers at regular intervals to determine if each of the servers is still active. The cluster controller...responding to name resolution request with the IP addresses of available web servers in the HAIS cluster." (see col. 8, lines 33-40).

Lastly, in response to applicant's argument that there is no suggestion to combine the references, the examiner recognizes that obviousness can only be established by combining or modifying the teachings of the prior art to produce the claimed invention where there is some teaching, suggestion, or motivation to do so found either in the references themselves or in the knowledge generally available to one of ordinary skill in the art. See *In re Fine*, 837 F.2d 1071, 5 USPQ2d 1596 (Fed. Cir. 1988) and *In re Jones*, 958 F.2d 347, 21 USPQ2d 1941 (Fed. Cir. 1992). In this case, Examiner submits that the claimed limitation "determining a time-scale modification playback rate considering the measure of CPU availability" is interpreted as the measure of CPU availability is to be determined and considered before the step of determining a time-scale modification rate. Thus, Hoyer is relied upon to teach a measure of CPU utilization determined in order to perform a determining step. Hoyer does not merely teach CPU utilization for the purpose of displaying only, see col.7, lines 22-26 and col. 8, lines 56-60, where Hoyer discloses the collection of CPU utilization to "allow an administrator to assess performance of Internet web sites." See also, where the number of available servers is determined in order to determine server activity (col. 8, lines 33-40).

C) Regarding claim 12, Applicant's submit that "neither Gupta nor Hoyer teaches "wherein playing back comprises associating a time-scale modification playback rate with each entry in a playback buffer queue.

As to the above point C), Examiner respectfully disagrees. Examiner submits, the arguments presented with respect to the instant claim relies upon the infallibility of the

arguments presented with claim 10. Thus, the rejection of the instant claim is maintained for substantially similar reasons.

D) Regarding claim 14, Applicant's submit that "Gupta nor Hoyer teaches "wherein the step of utilizing comprises ignoring or modifying the user input time-scale modification playback rate when it would interfere with providing continuous playback." As such a combination of Gupta and Hoyer would not arrive at the invention of claim 14. In fact Gupta teaches the opposite, i.e. using the user input leads to an interruption.

As to the above point D), Examiner respectfully disagrees. Examiner submits that the instant claim recites "ignoring or modifying the user input time-scale modification playback rate *when it would* interfere with providing continuous playback." The claim limitation reciting "when it would" is similar to stating "*if*". Language reciting a condition does not necessarily or clearly require the method functionality to be performed, but merely states performing the functionality (i.e. ignoring or modifying) *if* the condition is met or when it would be met. Applicant should amend the instant claim to clearly require the steps which Applicant intends for the claimed invention.

#### *Claim Rejections - 35 USC § 103*

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

- (a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary

skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 10-14, and 18 are rejected under 35 U.S.C. 103(a) as being unpatentable over Gupta (**US Publication No. 2002/0038374 A1**) in view of Hoyer et al. (**US Patent No. 6, 381, 635**).

**As per claim 10,** Gupta teaches a method for playback of streaming media received over a non-deterministic delay network at a client device which comprises receiving the streaming media at the client device, which client device includes a CPU (**figure 1 and col. 7, lines 38-50**); playing back the streaming media; determining a time-scale modification rate considering one user input time-scale modification to prepare the streaming media for playback (**col. 6, lines 39-48, user input is used for timeline modification changes and rate for playback at the client device and col. 6, lines 63-col. 7, lines 1-3**); and providing an indication of a current time-scale modification playback rate to the user (**Figure 5, col. 10, lines 23-30**).

Gupta does not explicitly teach determining a measure of **CPU availability**.

However Hoyer teaches determining a measure of CPU availability (**col. 7, lines 10-21**).

Accordingly, it would have been obvious to one of ordinary skill in the networking art at the time the invention was made to have incorporate Gupta's teachings to the teachings of Hoyer, for the purpose of routing request to client servers that are active and available (i.e. servers that have not failed or are in standby mode, **col. 7, lines 10-21**).

**As per claim 11,** Gupta-Hoyer teaches a method further comprises steps of providing an indication of a user requested time-scale modification playback rate (**Figure 5, col. 10, lines 23-30.**)

**As per claim 12,** Gupta-Hoyer teaches wherein the step of playing back comprises associating a time-scale modification playback rate with each entry in a playback buffer queue (**col. 10, lines 53-62.**)

**As per claim 13,** Gupta-Hoyer teaches wherein the indication comprises a function of recent time-scale modification playback rates (**col. 10, lines 53-62.**)

**As per claim 14,** Gupta-Hoyer teaches wherein the step of utilizing comprising ignoring or modifying the user input time-scale modification playback rate when it would interfere with providing continuous playback (**col. 8, lines 40-44.**)

**As per claim 18,** Gupta teaches a method for playback of streaming media received over a non-deterministic delay network at a client device which comprises steps of: receiving the streaming media at the client device, which client device includes a CPU; playing back the streaming media; determining a time-scale modification playback rate as a function of the measure and utilizing time-scale modification to prepare the streaming media for playback (**col. 6, lines 39-48, user input is used for timeline modification changes and a time-scale modification speed is designated from the user for playback at the client device and col. 6, lines 63-col. 7, lines 1-3.**)

Gupta does not teach determining a measure, where the measure is of CPU availability.

However, Hoyer teaches determining a measure, where the measure is of CPU availability (**col. 7, lines 10-21**).

Refer to the motivation of claim 10 which applies equally as well to claim 18.

### ***CONCLUSION***

**THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Joiya Cloud whose telephone number is 571-270-1146. The examiner can normally be reached Monday to Friday from on 7:30am-5:00pm. If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, William Vaughn can be reached on 571-272-3922. The fax phone number for the organization where this application or proceeding is assigned is 571-273-3922. Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system.

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Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

*JMC*

**Art Unit 2444**

**September 30, 2009**

**/William C. Vaughn, Jr./**

**Supervisory Patent Examiner, Art Unit 2444**